Supreme Court, U.S.
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No. 97-1966

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

DAVID BAXTER, Individually, and
the CITY OF MURFREESBORO,
Petitioners,

v.

JOHN W. REED and HENRY SHARBER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY DAVID BAXTER, and THE CITY OF MURFREESBORO, TENNESSEE

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QUESTION PRESENTED

Does the attorney client privilege protect communications between a city attorney and two city councilmen, the city manager, and the city fire chief, which involve pending litigation and possible future litigation against the public body?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Rule Involved 2

Statement of the Case 2

Statement of Facts 3

Reasons for Granting the Writ 3

I. The Petition Should Be Granted Because The Ruling Below Conflicts With The Rationale of This Court in *Swidler & Berlin, et al. v. United States* And Places Municipal Attorneys In An Impossible Privilege Position When Meeting With Agents Of A Municipality In Their Official Capacity 3

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

Cooper v. Williamson County Board of Education,
746 S.W.2d 176 (Tenn. 1987),
cert. denied, 500 U.S. 916 (1991) 5

Fausek v. White,
965 F.2d 126 (6th Cir. 1992) 7

Fisher v. United States,
425 U.S. 391 (1976) 4

In Re: Grand Jury Subpoena (United States v. Doe),
886 F.2d 135 (6th Cir. 1989) 7

In Re: Grand Jury Subpoena Duces Tecum,
112 F.3d 910 (8th Cir. 1997) 8

In Re: Grand Jury Subpoena Duces Tecum (Office of President v. Office of Independent Counsel),
112 F.3d 910 (8th Cir.) cert. denied,
117 S.Ct. 2482 (1997) 5, 7

In Re: Sealed Case,
121 F.3d 729 (C.A. D.C. 1997) 8

Jaffe v. Redmond,
518 U.S. 1 (1996) 4

Reed v. Baxter,
134 F.3d 351 (6th Cir. 1998) 1, 4, 7

Swidler & Berlin, et al. v. United States,
___ U.S. ____, 1998 WL 333019 (1998) 4, 9

Upjohn Company v. United States,
449 U.S. 383 (1981) 4

Rule Cited:

Federal Rule of Civil Procedure 26(b)(3) 2, 4

Current Model Rules of Professional Responsibility of the American Bar Association, Rule 1.13(E) 6

Current Model Rules of Professional Responsibility of the American Bar Association, Rule 1.7 6

Current Model Rules of Professional Responsibility of the American Bar Association, Rule 2.2 6

Other:

D.C. Bar, Legal Ethics Comm. Opinion,
268 (1996) 6

Amicus Curiae Petitioners, Randall L. Nelson, City Attorney, and The City of Chattanooga respectfully urge the issuance of a Writ of Certiorari as requested by David Baxter and the City of Murfreesboro to review the judgment of the United States Court of Appeals for the Sixth Circuit in this important case regarding the parameters of attorney client privilege which directly apply to all governmental and municipal attorneys. Consent to file this brief by the parties has been obtained pursuant to Supreme Court Rule 37(2).[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998) and is attached as Appendix A to the Petition for Writ of Certiorari filed by David Baxter and The City of Murfreesboro.

STATEMENT OF JURISDICTION

The statement of jurisdiction of David Baxter and the City of Murfreesboro is adopted and incorporated herein by reference.

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[1] Pursuant to Rule 37(6) of the Supreme Court Rules, no counsel for any party has authored this brief in whole or in part other than the *Amicus Curiae*, its members or its counsel and no monetary contributions have been made by any parties in the preparation for submission of this brief.

RULE INVOLVED

Federal Rule of Civil Procedure 26(b)(3) provides, in pertinent part:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(2) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT OF THE CASE

Randall L. Nelson, City Attorney and The City of Chattanooga as *amicus curiae* adopt in its entirety and incorporate by reference herein the statement of case set forth in the Petition for Writ of Certiorari filed by David Baxter and the City of Murfreesboro on June 3, 1998, and placed on this Court's docket on June 5, 1998.

STATEMENT OF FACTS

Randall L. Nelson, City Attorney, and the City of Chattanooga as *amicus curiae* adopt in its entirety and incorporate by reference herein the statement of facts set forth in the Petition for Writ of Certiorari filed by David Baxter and the City of Murfreesboro on June 3, 1998, and placed on this Court's docket on June 5, 1998.

REASONS FOR GRANTING THE WRIT

I.

The Petition Should Be Granted Because The Ruling Below Conflicts With The Rationale of This Court in *Swidler & Berlin, et al. v. United States* And Places Municipal Attorneys In An Impossible Privilege Position When Meeting With Agents Of A Municipality In Their Official Capacity.

The majority opinion of the Sixth Circuit Court of Appeals below adopted a position regarding the application of attorney client privilege in this case which is a matter of extreme concern to all governmental and municipal attorneys.

Although the common law rule of attorney client privilege is one of the oldest recognized privileges for confidential communications, the majority opinion of the Sixth Circuit below vacated the judgment of the District Court which had granted a protective order excluding testimony regarding conversations between the City Attorney, two City Councilmen, the City Manager, and the City Fire Chief. The effect of the majority opinion may be that municipal attorneys are not entitled to exercise the attorney client privilege where

meetings occur between City Council members and City administrative department heads in which the City Attorney gives legal advice and explains settlement discussions regarding a pending case. This *amicus curiae* brief strongly urges the granting of a petition for writ of certiorari in this case along the lines asserted in the eloquent dissent of Circuit Judge Nathaniel R. Jones, (See *Reed v. Baxter, supra* at 358-360).

This Court has most recently held in *Swidler & Berlin, et al. v. United States*, ___ U.S. ___, 1998 WL 333019 (1998) that the attorney client privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981). In considering whether the scope of attorney client privilege extended beyond the death of the client, this Court just held that its interpretation of the privilege's scope is guided by "the principals of the common law...as interpreted by the Court...in light of reason and experience." *Federal Rules of Evidence*, 501; and *Funk v. United States*, 290 U.S. 371 (1933).

In *Swidler & Berlin, supra*, this Court clearly reviewed the rationale behind the privilege and found that attorney client discussions are privileged because "without the privilege, the client may not have made such communications in the first place." See, *Jaffe v. Redmond*, 518 U.S. 1, 12 (1996); and *Fisher v. United States*, 425 U.S. 391, 403 (1976).

Pursuant to Rule 26(b)(3) of the Federal Rules of Civil Procedure, the petitioners in this case originally moved for and were granted a protective order against disclosures of the

mental impressions, conclusions, opinions and/or legal theories of an attorney or other representative of a party concerning the litigation which were discussed between the City Attorney, two members of the Murfreesboro, Tennessee City Council, the City Manager and the City Fire Chief. In reviewing a motion to quash the subpoenas and for a protective order, the District Court determined that the depositions would inquire into a privileged attorney/client discussion that occurred on December 16, 1992, between the City Attorney, two City Council members, the City Manager and the Fire Chief. The District Court also determined that in the December 16, 1992 meeting, the parties discussed pending litigation involving the vacancy in the Captain's position in the Fire Department and that the Murfreesboro City Attorney was acting in his capacity as City Attorney during the meeting.

The majority opinion of the Sixth Circuit Court of Appeals now creates an impossible client confidentiality position for attorneys representing governmental entities which are composed of multiple agents. Due to applicable Open Meeting Laws elected governmental officials and their attorneys already have very limited opportunities to receive confidential legal advice. See T.C.A. § 8-44-101, et. seq. Even so, discussions between a public body and its attorney concerning pending litigation have been found not to be subject to the Tennessee Open Meetings Act. See *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176 (Tenn. 1987), cert. denied, 500 U.S. 916 (1991).

Unlike the factual situation discussed by the Eighth Circuit Court of Appeals in *In Re: Grand Jury Subpoena Duces Tecum (Office of President vs. Office of Independent Counsel),* 112 F.3d 910 (8th Cir.) cert. denied, 117 S.Ct. 2482 (1997), this is not a situation where the City Attorney shared

information with individuals at a meeting who could not be considered to be his clients. It is of interest that the current Model Rules of Professional Responsibility of the American Bar Association proposed as Rule 1.13(E)clearly recognize that "a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7 and 2.2.

Local governmental representation does not tend to have as many layers of representation as counsel for the President and White House legal staff. The identity of the governmental client has been frequently the subject of scholarly discussion, usually for conflict of interest reasons. A recent opinion of the District of Columbia Bar (See, *D.C. Bar, Legal Ethics Comm. Opinion*, 268 (1996)), has concluded that the identity of the government client (like the identity of the corporate client) is "not primarily a question of legal ethics," but rather is a matter to be decided in the first instance between the lawyer and the person or persons authorized to speak for the government in the matter, "in accordance with the general precepts of client autonomy embodied in Rule 1.2" See also D.C. Bar Formal Ethics Opinion 95-390. The Model Rules further contain specific prohibitions against revealing information relating to representations of a client at proposed Rule 1.6 which do not except governmental entity clients.

The elements of attorney client privilege within the Sixth Circuit are as follows: (1) Where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal advisor; (8) unless the protection is

waived. See, *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992).

The distinction of the majority opinion of the Sixth Circuit Court of Appeals of this case from its earlier decision in *In Re: Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135 (6th Cir. 1989) is of extreme concern to governmental attorneys in Tennessee. Municipal attorneys in this state have to give advice on a daily basis when requested by municipal legislators and municipal administrative officials. It is difficult to understand why such advice is now held not to be confidential because the interests of the Council Members and the interests of the City Executives are not always the same. See *Reed v. Baxter, supra* at 357.

A municipal attorney giving advice to individuals who are normally his clients is now put into the impossible position of determining the viewpoint of each client as to pending or future litigation before any information may be deemed to be confidential. Such a broad abolition of the attorney client privilege for municipal attorneys is not warranted by *In Re: Grand Jury Subpoena Duces Tecum (Office of President vs. Office of Independent Counsel), supra*. There is no information in this record that any communication between City Council Members and their attorney in the presence of City Administrative Officials was not conducted within the attorney client relationship. Regardless of the personal interests of Councilman Ross and Bratcher, it is strongly asserted that such Councilmen were the clients of the City Attorney when he met with them on December 16, 1992 and as such, any discussions at such meeting were shielded from disclosure by the attorney client privilege. It is foreign to the concept of attorney client privilege that individuals with whom an ongoing attorney client relationship exists in their representative capacity for the City of Murfreesboro are

actually third parties to a discussion with the City Attorney.

It is further strongly asserted that there is a dispute among the Circuits as to the extent of privilege which is applicable to a number of confidential communications due to recent developments interpreting privileges applicable to Presidential documents and verbal communications. See, *In Re: Sealed Case*, 121 F.3d 729 (C.A. D.C. 1997); and *In Re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). As *amicus curiae* for the petitioners and also as municipal attorneys constantly forced to make confidential communications with our clients, it is respectfully submitted that certiorari should be granted based upon the facts and law applicable to this case. This is an important matter which should be decided by this Court based upon the practical problems in representing municipal clients and their elected officials by municipal attorneys across this country and not by analogy based upon the intricate levels of legal representation available to the President of the United States.

CONCLUSION

This Court has recently upheld the attorney client privilege in *Swidler & Berlin, supra*, even after the death of the client upon the basis that "without the privilege, the client may not have made such communications in the first place." The majority opinion gives little guidelines to any municipal attorney as to which communications with his clients may be confidential. As such, the majority opinion deludes the attorney client privilege of municipal attorneys and directly conflicts with encouraging full and frank communications between attorneys and their clients.

Accordingly, *amicus curiae* petitioners, Randall L. Nelson, City Attorney, and the City of Chattanooga

respectfully urge this Court to grant the petition for writ of certiorari filed by David Baxter and the City of Murfreesboro.

Respectfully submitted,

/s/_____
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